Office - Supreme Court, U.S
FILED
SEP 14 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1437 (13)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JEFFREY MAREK, THOMAS WADYCKI,
and LAWRENCE RHODE,
Petitioners,

v.

ALFRED W. CHESNY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

HAROLD R. TYLER, JR.*
SARA E. LISTER
HEATHER D. DIDDEL
PATTERSON, BELKNAP,
WEBB & TYLER
30 Rockefeller Plaza
New York, New York 10112
(212) 541-4000
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 783-6518
* Attorney of Record

FRED N. FISHMAN
ROBERT H. KAPP
Co-Chairmen
NORMAN REDLICH
Trustee
WILLIAM L. ROBINSON
NORMAN J. CHACHKIN
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1400 Eye Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 371-1212

Attorneys for *Amicus Curiae*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

27 pp

QUESTION PRESENTED

Whether Rule 68 requires that a prevailing party in a civil rights action brought under 42 U.S.C. § 1983 be denied attorneys' fees for time expended on the case after rejecting a settlement offer more favorable than the amount subsequently recovered after trial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1437

JEFFREY MAREK, THOMAS WADYCKI, and LAWRENCE RHODE,
Petitioners,
v.
ALFRED W. CHESNY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law (the "Committee") was organized in 1963 at the request of the President of the United States to involve private attorneys in the national effort to protect the civil rights of all Americans. The Committee has had the assistance of well over a thousand members of the private bar in numerous cases that have addressed the problems of minorities and the poor. As a frequent liti-

---

[1] Letters from counsel for the parties consenting to the submission of this brief have been filed with the Clerk.

gant in cases brought under 42 U.S.C. § 1983 and other remedial statutes which contain fee-shifting provisions, the Committee will be directly affected by the decision in this case.

The issue presented here is whether "costs" under Fed. R. Civ. P. 68 ("Rule 68") include attorneys' fees where the statute under which the case is brought provides that a prevailing plaintiff may receive attorneys' fees. Such fee-shifting statutes exist because, in each substantive area to which they apply, Congress has determined that the public interest is served by awarding attorneys' fees to successful litigants. The Committee has had first-hand experience with such fee-shifting provisions, and with the kinds of settlement offers likely to be made in civil rights cases. The Committee believes that the interpretation of Rule 68 urged by petitioners would have a direct and harmful effect on civil rights plaintiffs and other plaintiffs who serve as "private attorneys general" and thus help to advance national policy. The Committee files this brief in support of respondent urging affirmance of the judgment below.

STATEMENT

Respondent Alfred W. Chesny filed suit in 1979 under 42 U.S.C. § 1983 against petitioners, police officers of the Village of Berkley, Illinois, seeking damages because of petitioners' allegedly unlawful shooting of his son. On November 5, 1981, petitioners made an offer of judgment under Rule 68 "for a sum, including costs now accrued and attorney's fees, of ONE HUNDRED THOUSAND ($100,000) DOLLARS." Joint Appendix at A-17. The respondent refused the offer and the case proceeded to trial. On May 11, 1982, the jury returned a verdict in favor of respondent in the amount of $60,000. Respondent then moved under the Civil Rights Attorney's

Fees Awards Act of 1976 ("Fees Awards Act"), 42 U.S.C. § 1988, for a fee award.[2]

The district court held that Rule 68 limited respondent's fee award to the time and effort expended prior to petitioners' offer of judgment. Rule 68 provides that if a plaintiff receives less after trial than the defendant's offer of judgment, then plaintiff "must pay the costs incurred after the making of the offer." The district court interpreted "costs" under Rule 68 to include attorneys' fees where the statute under which the action was brought authorizes an award of attorneys' fees, as part of the costs, to a prevailing party.

The Seventh Circuit, in an opinion by Judge Posner, reversed on the ground that Rule 68 cannot be interpreted to defeat Congress' policy to award fees to prevailing plaintiffs where those plaintiffs acted as private attorneys general. It emphasized that civil rights plaintiffs

> should not be deterred from bringing good faith actions to vindicate fundamental rights by the prospect of sacrificing all claims to attorney's fees for legal work at the trial if they win, merely because on the eve of trial they turned down what turned out to be a more favorable settlement offer.

Chesny v. Marek, 720 F.2d 474, 479 (7th Cir. 1983).

The Seventh Circuit found that although Rule 68 was clearly intended to encourage settlements, and thus to conserve the resources of both the parties and the courts, it could not have been intended to alter substantive con-

---

[2] The United States has emphasized in its amicus brief that substantial attorneys' fees were generated in this case. *See e.g.*, Brief of United States at 3. The size of the fee requested by respondent after trial is irrelevant to this Court's determination of the issues before it. Nothing in the record, however, suggests that the fees requested were excessive or inconsistent with the work required to bring the case to trial.

gressional policies, such as those underlying the Fees Awards Act. The Rules Enabling Act, 28 U.S.C. § 2072, provides that the Federal Rules "shall not abridge, enlarge or modify any substantive right." Accordingly, the court held that Rule 68 must be interpreted consistently with the substantive policies of the Fees Awards Act.

SUMMARY OF ARGUMENT

Petitioners' interpretation of Rule 68 would significantly enlarge the role and effect of settlement offers to the serious detriment of civil rights plaintiffs. Any claim that "costs" under Rule 68 include attorneys' fees contravenes basic rules of statutory construction and legal precedent, and critically undermines federal legislation enacted to protect fundamental national policies.

Rule 68 provides that a party may be held responsible for "costs" under specified circumstances. "Costs" are not defined in the Federal Rules, although seven Rules provide for their award. The courts have consistently interpreted "costs" as used in the Rules to include those costs set out in 28 U.S.C. § 1920 and generally awarded to the prevailing party under the "American rule," which does not permit the award of attorneys' fees. Those Federal Rules which permit courts to award attorneys' fees as a sanction characterize such fees as "expenses," not "costs." "Costs" should be defined consistently in all the Federal Rules which authorize their award.

Petitioners would interpret costs under Rule 68 differently depending on whether the statute under which the action is brought provides for an award of attorneys' fees to a prevailing plaintiff. Petitioners argue that if such an award is authorized by statute, the "costs" which become the responsibility of the prevailing plaintiff under Rule 68 include such fees. Under this view, the goals Congress sought to achieve with fee-shifting would be negated by Rule 68 whenever a defendant makes an offer

of judgment which proves greater than the sum awarded plaintiff after trial.

The definition of "costs" under Rule 68 should not expand or contract depending on the statutory basis for suit. Instead, fee shifting is appropriate where authorized by a substantive statute, even if Rule 68 may otherwise cut off the plaintiff's reimbursement for costs. Any other conclusion would be contrary to Congress' intention in providing for fee-shifting in civil rights cases, and would have a seriously chilling effect on plaintiffs seeking injunctive or other nonmonetary relief. Any interpretation of Rule 68 that greatly increases the risks of litigation to such plaintiffs provides defendants in civil rights cases with a new and effective weapon to frustrate meritorious actions in a manner never intended by Congress.

ARGUMENT

I. THE "COSTS" SPECIFIED IN RULE 68 DO NOT INCLUDE ATTORNEYS' FEES

The term "costs" as used in the Federal Rules of Civil Procedure should be given its common meaning, and should be interpreted consistently throughout the Rules. Nowhere in the Rules are "costs" defined to include attorneys' fees within the taxable costs of litigation.[3] Rule 68 uses the term "costs" in the same way as other Rules which permit costs to be taxed to one party or an-

---

[3] The current Rules which provide for the award of costs under certain circumstances are Rule 41(d) (Costs of Previously Dismissed Action); Rule 54(d) (Judgments; Costs); Rule 55(b)(1) (Judgment by Default); Rule 65(c) (Security); Rule 68 (Costs); and Rule 71A(*l*) (Costs in Condemnation Actions), which quotes a Justice Department manual for use in condemnation suits to the effect that "normal expenses," including the fees of counsel appointed to represent absent defendants so that quiet title may be transferred, are to be charged to the government directly but "not taxed as costs." Rule 76(c) (Judgment of the District Judge on the Appeal Under Rule 73(d) and Costs) also provides for award of costs.

other upon the occurrence of a particular event. "[T]he plain language of Rule 68," *Delta Airlines v. August*, 450 U.S. 346, 351 (1981), mandates that "costs" be interpreted in Rule 68 consistently with the other Federal Rules.

Whenever attorneys' fees are mentioned in the Rules they are included as a sanction which may be invoked to punish noncompliance with a particular rule. Attorneys' fees are uniformly described within the Rules as an element of expenses.[4] This treatment of attorneys' fees is consistent with the characterization of attorneys' fees in the Federal Rules of Appellate Procedure, and with the American rule that the costs to be awarded to a prevailing party do not include attorneys' fees.[5]

Moreover, such a construction is consistent with this Court's recent analyses of the interplay between Rules 54(d) and 68. Under Rule 54(d), a prevailing plaintiff "presumptively" will obtain costs. *Delta Airlines*, 450 U.S. at 352. The "costs" to be taxed under Rule 54(d) do not include attorneys' fees, which become payable by a losing defendant only pursuant to applicable statute. *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975).[6] The Court's mandate in *Delta Airlines* that

[4] The current Federal Rules which provide for the award of "expenses . . ., including a reasonable attorney's fee," are Rules 11; 16(f); 26(g); 30(g); 37(a)(4), (b)(2), (c), (d) and (g); and 56(g).

[5] The Federal Rules of Appellate Procedure allow award of attorneys' fees under Rule 38, "Damages for Delay." The Advisory Committee Notes to that Rule state that "damages, attorney's fees, and other expenses incurred by an appellee" may be awarded if an appeal is found to be frivolous.

[6] While Rule 54(d) makes liability for costs "a normal incident of defeat," *Delta Airlines*, 450 U.S. at 352, it also provides that courts may otherwise direct, and that exceptions to the Rule exist where "express provision therefor is made either in a statute of the United States or in these rules." The flexibility of Rule 54(d) is not found in Rule 68. Rule 68 makes no provision for the exercise of

the Federal Rules be interpreted consistently with one another clearly requires that the taxable "costs" under Rule 68, as under Rule 54(d) and other Rules, exclude attorneys' fees.

Both Congress and the courts have treated attorneys' fees differently from other costs and expenses of litigation. Just as doctors' fees are a major component of the cost of medical care, so attorneys' fees are a large part of the costs of litigation.[7] Nonetheless, the general (or "American") rule is that each litigant ordinarily must bear its own attorneys' fees unless there is express statutory authorization to the contrary. The American rule, which is contrary to the preexisting common law policy, was intended to equalize the burden of litigation, making it more likely that litigants without deep pockets would be able to assert their rights in court. With narrowly defined exceptions,[8] this Court has made clear that Congress alone has the authority to create and define the situations in which a reallocation of attorneys' fees serves a public purpose. *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. at 260, 262 (1975).

Costs are in an altogether different category than attorneys' fees. This Court recognized as early as 1851 that "the legal taxed costs are far below the real expenses incurred by the litigant." *Day v. Woodworth*, 54

discretion by the court, nor does it indicate that the "costs" which may be reallocated to encourage settlement should be interpreted differently depending on the statute involved.

[7] *See, e.g.*, Note, *The Impact of Proposed Rule 68 on Civil Rights Litigation*, 84 Colum. L. Rev. 719, 720 (1984) (attorneys' fees are "by far the largest expense of litigation"); and Comment, *Taxation of Costs in Federal Courts—A Proposal*, 25 Am. U.L. Rev. 877, 881 (1976) (attorneys' fees "are often the single, largest expense of litigation").

[8] The principal exceptions involve bad faith and the existence of "common funds." *See* Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 Colum. L. Rev. 346, 349 (1980).

U.S. (13 How.) 363, 372 (1851). "Costs" that were awarded to the successful litigant did not include attorneys' fees. As the Court held, it was not the American practice "to indemnify the plaintiff for counsel-fees and other real or supposed *expenses over and above taxed costs.*" *Id.* at 371-72 (emphasis added). *See also Sioux County v. National Surety Co.*, 276 U.S. 238 (1928), where this Court held that an attorney's fee award authorized by state statute was not the same as "costs in the ordinary sense of the traditional arbitrary and small fees . . . allowed to counsel. . . ." *Id.* at 243.

The federal courts have consistently interpreted "costs" under Rule 68, as under the other Federal Rules, to refer to taxable costs as those costs are defined in 28 U.S.C. § 1920. *See White v. New Hampshire Department of Employment*, 629 F.2d 697, 702-03 (1st Cir. 1980), *rev'd on other grounds*, 455 U.S. 445 (1982); *Greenwood v. Stevenson*, 88 F.R.D. 225, 231-32 (D.R.I. 1980). *See also Pigeaud v. McLaren*, 699 F.2d 401, 403 (7th Cir. 1983); Note, *The Impact of Proposed Rule 68 on Civil Rights Litigation*, 84 Colum. L. Rev. 719, 721 n.9 (1984). Section 1920 was enacted to standardize the treatment of costs in federal litigation, *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 759-61 (1980), and constitutes the "modern version" of the 1853 Fee Act, 10 Stat. 161, whose "explicit purpose . . . was to limit the award of costs to specific itemized expenses related to the mechanics of bringing a case before the courts." *Dowdell v. City of Apopka, Florida*, 698 F.2d 1181, 1189 n.12 (11th Cir. 1983). In *Hairline Creations, Inc. v. Kefalas*, 664 F.2d 652, 655 (7th Cir. 1981), the court referred to Section 1920 as the standard by which to assess costs on a Rule 54(d) motion since that Rule, like Rule 68, does not define costs. Thus, the "rule implicitly embodies the American rule, whereby parties ordinarily cannot recover attorneys' fees as costs." *Id.* at 655 (citation omitted).[9]

[9] The following articles, published almost contemporaneously with the enactment of the Federal Rules in 1938, illustrate the applicability of the American rule that attorneys' fees are not costs to be shifted from one party to another unless a statute so provides. McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 Minn. L. Rev. 619 (1931); Payne, *Costs in Common Law Actions in the Federal Courts*, 21 Va. L. Rev. 397 (1935); Note, *Distribution of Legal Expenses Among Litigants*, 49 Yale L.J. 699 (1940); Note, *Costs—Problems in the Allowance of Attorneys' Fees in America*, 21 Va. L. Rev. 920 (1935).

As the Court stated in *Alyeska*, Congress has not "retracted, repealed, or modified the limitations on taxable fees contained in the 1853 statute and its successors." 421 U.S. at 260 (footnote omitted). Those limitations are now contained in Section 1920. By not amending that provision to encompass attorneys' fees, Congress has implicitly confirmed that, as a general rule, taxable costs are those delineated in Section 1920. Where Congress has deemed it appropriate to provide attorneys' fees, it has made "specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights." *Id.* (citation omitted).

Similarly, this Court has referred to attorneys' fees that may be awarded under the Federal Rules as part of expenses, not costs. In *Hutto v. Finney*, 437 U.S. 678 (1978), the Court noted that it was within the power of an equity court to award attorneys' fees "against a party who shows bad faith" and that the use of such Federal Rules as 37(a)(4) and 56(g) for this purpose "vindicates judicial authority without resort to the more drastic sanctions available . . . and makes the prevailing party whole *for expenses caused* by his opponent's obstinacy." *Id.* at 689 n.14 (emphasis added).

Finally, it is significant that the Advisory Committee of the Judicial Conference of the United States has consistently characterized attorneys' fees as expenses, not costs. The Committee's 1983 proposal to revise Rule 68 to encourage settlements would have provided for the shifting of costs "*and expenses, including any reasonable attorneys' fees.*" *Preliminary Draft of Proposed Amend-*

ments, 98 F.R.D. 337, 362, 365 (1983) (emphasis added).[10] Both the original draft and a recent revision provide expressly for awards of attorneys' fees under Rule 68 so that settlements will be encouraged. The Committee's draft amendments would define attorneys' fees as part of expenses, consistently with the long-standing interpretation of the rest of the Rules.

II. CONGRESS DID NOT INTEND FEE-SHIFTING STATUTES TO EXPAND THE DEFINITION OF "COSTS" IN RULE 68

Both petitioners and the United States argue that Congress must have known in 1938, when the Federal Rules were adopted, that costs under Rule 68 would include attorneys' fees because Congress had already provided that in some circumstances attorneys' fees could be reallocated as part of the costs of an action. This argument is untenable. In none of the fee-shifting statutes that predate the Federal Rules did Congress provide simply for the shifting of "costs" without clearly stating that those costs —unlike taxable costs—included attorneys' fees.

The pre-1938 statutes that provided for fee-shifting served a variety of public purposes[11] and did not use

[10] The draft was subsequently withdrawn and replaced by a more recent revision. The current draft, now under consideration by the Advisory Committee, proposes that costs and expenses, including reasonable attorneys' fees, be shifted as a sanction that may be imposed by the court "as a means of facilitating the efficient operation of the litigative process." The Rules cited by the Committee's comments as applying the same principle are those Rules that specifically refer to attorneys' fees: Rule 37(b)(2), (c) and (d); Rules 11 and 26(g); Rule 56(g); Rule 30(g); and Rule 41(a)(2). Committee on Rules of Practice and Procedure, Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure* 12-19 (1984).

[11] The Interstate Commerce Act, (the "Act"), c. 104, § 8; 24 Stat. 379, 382 (1887), (cited by the government in its brief in the Act's codified version as 49 U.S.C. § 11705(d)(3) and as post-1938) contains an early example of fee-shifting to encourage private enforcement of safety standards for the public benefit. The Act provided that "such common carrier shall be liable to the person . . . injured thereby for the full amount of damages . . . together with a reasonable counsel or attorney's fee." Similarly, under Section 40 of the Copyright Act of 1909, 35 Stat. 1084, now codified at 17 U.S.C. § 505, the court in its discretion "may award" such attorneys' fees to a prevailing party "as part of the costs." Congress intended there to compensate the prevailing party for expenses to encourage active protection of copyright, since the value of the copyright, and hence any damage recovery, is difficult to measure. *See* Note, *Distribution of Legal Expenses Among Litigants*, 49 Yale L.J. 699, 707 (1940).

identical language, or provide for uniform fee shifting if the plaintiff prevailed. Formulations, and the amount of discretion the courts were given in determining whether to award *any* attorneys' fees, varied with each statute. For example, the Packers and Stockyards Act of 1921, 7 U.S.C. § 210(f), states that "[i]f the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit." The Clayton Act, 15 U.S.C. § 15(a), provides that prevailing plaintiffs "shall recover . . . the cost of suit, including a reasonable attorney's fee." The Securities Act of 1933, 15 U.S.C. § 77k(e), provides that the court may "require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees" and that if the court believes the suit or defense to have been without merit, the prevailing party may receive costs "in an amount sufficient to reimburse him for the reasonable expenses incurred by him." These and other statutes cited by petitioners and the United States[12] suggest only that attorneys' fees were considered part of "the cost of suit" to be shifted when Congress elected to do so to achieve certain goals. These statutes do not, however, indicate any congressional intention to define

[12] The Norris-LaGuardia Act, 29 U.S.C. 107(e), cited by the United States, provides that before a temporary restraining order may be issued, the party which has requested it must provide an undertaking, the amount of which will be fixed by the court, sufficient to cover "all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order."

"costs" under the Federal Rules to include attorneys' fees.

If Rule 68 is interpreted as it was by the district court, and as now urged by petitioners, the definition of "costs" for the purpose of Rule 68 would vary with the statutory basis of the underlying action. It is anomalous to define "costs" under Rule 68, but not the other Federal Rules,[13] differently depending on (1) whether the prevailing plaintiff would otherwise be entitled to attorneys' fees under the statute;[14] (2) if so, whether that statute permitted the award of costs, "including" attorneys' fees, *or* instead, costs "and" attorneys' fees, in which case Rule 68 would not apply under petitioners' argument since fees are not described *as part of* costs;[15] (3) whether the fee award statute provides for a mandatory or discretionary award of fees;[16] and (4) whether the statute authorizes attorneys' fees to the prevailing party, either plaintiff or

---

[13] The Advisory Committee's 1938 notes to Rule 54(d), which provided then as now for a shifting of costs, cited an article by Payne, *Costs in Common Law Actions in the Federal Courts*, 21 Va. L. Rev. 397 (1935) for an explanation of "the present rule in common law actions." The article indicates that attorneys' fees were not considered part of the costs to be awarded.

[14] For example, *see* 49 U.S.C. § 11705(d)(3) (mandatory award of attorneys' fees against carrier in violation of Interstate Commerce Act).

[15] Compare, for example, the Securities Exchange Act of 1934, 15 U.S.C. § 78i(e) ("[T]he court may . . . assess reasonable costs, including reasonable attorneys' fees . . ."), with 28 U.S.C. § 1927 ("[A]ny attorney . . . [engaged in vexatious litigation] may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred. . .").

[16] Compare the Clayton Act, 15 U.S.C. § 15(a) ("[A]ny person who shall be injured . . . shall recover . . . the costs of suit, including a reasonable attorney's fee"), with 17 U.S.C. § 505 ("the court may . . . award a reasonable attorney's fee to the prevailing party as part of the costs").

defendant.[17] Rule 68 should not be interpreted in this varying and essentially haphazard way. Nor should it be interpreted to disadvantage prevailing plaintiffs in civil rights litigation who have not accepted an offer of judgment. There is no logical way, given a definition of costs that varies with the cause of action, to ensure that costs —enormously increased to include the losing defendant's attorney's fee—would not be shifted to the prevailing plaintiff in a civil rights action.[18] In contrast, prevailing plaintiffs to whom Rule 68 is equally applicable but who are *not* eligible for fee-shifting would have the benefit of the common interpretation of costs. Thus, they would be required, at most, to pay costs as those costs are usually defined.

---

[17] *See*, for example, 17 U.S.C. § 505, cited above, and the Agricultural Fair Practices Act of 1967, 7 U.S.C. § 2305(a) ("[T]he court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs").

[18] As Justice Rehnquist explained in *Delta Airlines*, 450 U.S. at 378,

> To construe Rule 68 to allow attorney's fees to be recoverable as costs would create a two-tier system of cost-shifting under Rule 68. Plaintiffs in cases brought under those statutes which award attorneys' fees as costs and who are later confronted with a Rule 68 offer would find themselves in a much different and more difficult position than those plaintiffs who bring action under statutes which do not have attorneys' fees provisions. No persuasive justification can be offered as to how such a reading of Rule 68 would in any way further the intent of the Rule which is to encourage settlement.

It is true that the district court in this case did not require the plaintiff to pay the attorneys' fees incurred by the *defendants* after rejection of the settlement offer and that petitioners do not seek that result here. Nevertheless, we believe that it will be difficult to limit the effect of the approach urged by petitioners. Once the mechanical operation of Rule 68 is permitted to defeat the congressional policy of awarding fees to prevailing plaintiffs in Section 1983 suits, every defendant in a civil rights case can be expected to argue that the "pro-settlement" objectives of Rule 68 should be maximized by including defendants', as well as plaintiffs', fees in the "costs incurred" after rejection of a settlement offer.

Adoption of petitioners' construction of Rule 68 would defeat the careful congressional policies embodied in the fee-shifting statutes. Congress has historically used fee-shifting to encourage private citizens to enforce certain statutes and to vindicate national policies. Fee-shifting encourages private citizens to use their statutory rights to obtain redress for wrongs. Such wrongs need not involve pecuniary damages and therefore may not result in damage awards from which attorneys' fees can be paid.

Although fee-shifting is an essential mechanism through which Congress has particularly encouraged protection of the civil rights of all Americans,[19] fee awards have also been provided by Congress in litigation involving other areas of public concern, such as the environment (Clean Air Act, 42 U.S.C. § 7604(d)); consumer affairs (Truth in Lending Act, 15 U.S.C. § 1640(a)); and labor matters (Fair Labor Standards Act, 29 U.S.C. § 216(b)). Congress has differentiated among fee statutes as to the extent of entitlement,[20] thereby expressing its view that the need for fee-shifting may vary between subject areas.

---

[19] "The fee provisions of the civil rights laws are acutely sensitive to the merits of an action and to antidiscrimination policy." *Roadway Express*, 447 U.S. at 762. *See* Title II and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b), 2000e-5(k), providing in public accommodations and employment discrimination cases that the prevailing party may receive "a reasonable attorney's fee as part of the costs." Congress has included fee-shifting provisions in most recent civil rights legislation.

[20] For example, a fee award is mandatory under the Truth in Lending Act for a prevailing plaintiff; and is to be awarded under Title II of the Civil Rights Act of 1964 in the absence of exceptional circumstances. The House report on the subject of fee-shifting at the time of the 1976 Fees Awards Act, described the variations in some of these laws:

> [T]he United States Code presently contains over fifty provisions for the awarding of attorney fees in particular cases. They may be placed generally into four categories: (1) mandatory awards only for a prevailing plaintiff; (2) mandatory awards for any prevailing party; (3) discretionary awards for a prevailing plaintiff; and (4) discretionary awards for any prevailing party. Existing statutes allowing fees in certain civil rights cases generally fall into the fourth category.

H.R. Rep. No. 1558, 94th Cong., 2d Sess. 5 (1976).

The inappropriateness of a construction of Rule 68 that defeats Congress' fee-shifting provisions is shown by examination of the purposes of those provisions. The private citizen who brings suit to enforce the civil rights laws does so not for himself alone, but as a "'private attorney general' vindicating a policy that Congress considered of the highest priority." *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968) (footnote omitted). Congress has expressly acknowledged the significant role "private attorneys general" play in the enforcement of its policies and has long sought to encourage individuals to fulfill this critical function by authorizing the statutory award of attorneys' fees. S. Rep. No. 1011, 94th Cong., 2d Sess. 3 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5910 (hereinafter S. Rep. No. 1011). Failure to award attorneys' fees in such cases "would be tantamount to repealing the Act itself by frustrating its basic purpose. . . . Without counsel fees the grant of Federal jurisdiction is but a[n empty] gesture. . . ." *Hall v. Cole*, 412 U.S. 1, 13 (1973) (discussing award of attorneys' fees in a Labor-Management Reporting and Disclosure Act case).

There is, therefore, a strong and consistent congressional policy to authorize fee-shifting only when, and to the extent, that Congress finds shifting to be in the public interest. To change the definition of costs in Rule 68, as petitioners now urge, would defeat that careful congressional policy, inhibit the achievement of important national goals, and substitute uncertainty and confusion.

III. THE EXERCISE OF RIGHTS GUARANTEED BY CONGRESS THROUGH SECTION 1983 WILL BE IMPERMISSIBLY CHILLED IF RULE 68 COSTS ARE INTERPRETED TO INCLUDE ATTORNEYS' FEES

Respondents sued under 42 U.S.C. § 1983, which was derived from Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, and provides a right of action "in favor of persons who are deprived of 'rights, privileges or immunities secured' to them by the Constitution." *Carey v. Piphus*, 435 U.S. 247, 253 (1978) (citation omitted). Section 1983 "opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Mitchum v. Foster*, 407 U.S. 225, 239 (1972) (footnote omitted).

The Fees Awards Act was intended by Congress to ensure effective enforcement of Section 1983 and other civil rights laws "by making it financially feasible to litigate civil rights violations." *Dowdell v. City of Apopka, Florida*, 698 F.2d 1181, 1189 (1983) (citation omitted). Congress and the courts have recognized that civil rights litigants are often poor, and that the available judicial remedies may be non-monetary (*Mitchum v. Foster*, 407 U.S. 225) or an award of nominal damages (*Carey v. Piphus*, 435 U.S. 247).[21] Compensatory damages, together with attorneys' fees, are intended to compensate the victim *and* deter violations of the civil rights laws. Civil rights legislation manifests "heavy reliance" on attorneys' fees. S. Rep. No. 1011 at 3. The important purposes of Section 1988, as well as Section 1983, would be gravely threatened if an offer of judgment made under Rule 68 could, without more, prevent

[21] *See* Committee on Legal Assistance, *Counsel Fees in Public Interest Litigation*, 39 Rec. A.B. City N.Y. 300 (May/June 1984), for a recent analysis of fee awards in civil rights cases and the policy implications of such awards.

courts from exercising their discretion with respect to the award of attorneys' fees.[22]

The legislative history of Section 1988 reveals continued congressional concern with the enforcement of federal civil rights laws, and a commitment to attorneys' fees awards as an "integral part of the remedy necessary to achieve compliance" with the fundamental statutory policies:

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. Rep. No. 1011 at 2.

This Court has recognized, as did the Senate Judiciary Committee in considering fee-shifting as a remedy in civil rights cases,[23] that the potential liability of Section 1983 defendants for attorneys' fees "provides additional —and by no means inconsequential—assurance that agents of the State will not deliberately ignore due process rights." *Carey v. Piphus*, 435 U.S. at 257 n.11.[24]

[22] *See*, for example, Note, *The Offer of Judgment Rule in Employment Discrimination Actions: A Fundamental Incompatibility*, 10 Golden Gate U.L. Rev. 963 (1980).

[23] The Senate Judiciary Committee concluded in 1976, after extensive hearings on the subject, that "the effects of such fee awards are ancillary and incident to securing compliance with these laws, and that *fee awards are an integral part of the remedies necessary to obtain such compliance.*" S. Rep. No. 1011 at 5 (emphasis added).

[24] Congress continues to recognize the importance of fee-shifting to ensure that there will be civil rights plaintiffs. The current Chairman of the Senate Judiciary Committee's Subcommittee on the

If petitioners' interpretation of the interplay between Rule 68 and Section 1988 were correc. these long-settled policies would be defeated. Rule 68 does not permit a court to evaluate the "value" of injunctive relief. Thus, a civil rights plaintiff presented with an early offer of judgment that included a realistic estimate of damages but no nonmonetary relief would be left seriously at risk by refusing to settle. Encouraging premature settlements of civil rights actions would, contrary to the intent of Congress, erode enforcement of civil rights and other statutes.

These problems would be compounded by simple economics. A defendant with deep pockets could use his resources to increase the plaintiff's litigation expenses by expanding discovery and engaging in extensive motion practice.[25] Costs and attorneys' fees would be incurred by both sides. If petitioners' view of Rule 68 prevails, and attorneys' fees and costs can be shifted to the plaintiff, the defendant with deep pockets would be able greatly to increase the plaintiff's risks of refusing a set-

---

Constitution, Senator Orrin Hatch, has recognized that the Fees Awards Act was intended to benefit only plaintiffs:

> The legislative history of the 1976 Fees Act pointed out clearly, and correctly I think, the need for the dual standard: If the persons seeking to enforce their civil rights were faced with paying their opponents [sic] attorneys' fees if they simply did not win the case, the Fees Act would create a greater disincentive to bring these civil rights suits than the situation it attempted to remedy.

128 Cong. Rec. S4878 (daily ed. May 11, 1982).

[25] "[D]iscovery practices enable the party with greater financial resources to prevail by exhausting the resources of a weaker opponent." *Amendments to the Federal Rules of Civil Procedure*, 85 F.R.D. 521, 523 (1980). (Dissent by Justices Powell, Stewart and Rehnquist to the adoption of amendments to the Federal Rules of Civil Procedure discovery rules).

tlement offer.[26] These risks may compel the plaintiff's attorney to recommend settlement even if by doing so the plaintiff abandons an opportunity to obtain important nonmonetary relief.

These dangers are illustrated by this case. The jury award in this case consisted of $52,000 for the violation of civil rights; $3,000 as punitive damages; and $5,000 for wrongful death. Pet. Brief at 4. In nonmonetary terms, respondent was vindicated, and it is not unreasonable to believe that the jury verdict may have had a beneficial effect on the community involved, thereby achieving one of the congressional purposes in enacting Sections 1983 and 1988. Although the United States has characterized the offer of judgment here as "obviously reasonable" and chastized respondent for his "unreasonable failure to accept a favorable settlement," Brief of the United States at 3, neither the District Court nor the Court of Appeals suggested that the refusal of the offer was unreasonable under the circumstances. Instead, both courts recognized that new dilemmas for civil rights attorneys and their clients would be created if Rule 68 were read to preclude awards of attorneys' fees after a settlement offer higher than the ultimate jury verdict. *Chesny v. Marek*, 547 F. Supp. 542, 547 (N.D. Ill. 1982); 720 F.2d 474, 478-79 (7th Cir. 1983).

Rule 68 should not be interpreted so as to increase the pressures on civil rights plaintiffs and similar beneficiaries of fee-shifting statutes to settle, while leaving other plaintiffs subject to the Rule with the lesser burden of traditional costs. The fundamental policies behind fee-

---

[26] The "risks" of failing to settle, under petitioners' interpretation of Rule 68, might include the following: (1) the plaintiff would have to bear his own attorney's fee after the offer; (2) the public interest attorney would be unable to obtain reimbursement for time spent after the offer; and (3) defendant's costs and attorney's fees would have to be borne by the successful plaintiff. *See also* n.18, *infra* at p. 13.

shifting legislation should not be swept away by an artificial construction of a rule which is merely procedural. Congress did not intend that Rule 68 would be used to negate basic public policies designed to protect essential civil liberties.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

HAROLD R. TYLER, JR.*
SARA E. LISTER
HEATHER D. DIDDEL
PATTERSON, BELKNAP,
WEBB & TYLER
30 Rockefeller Plaza
New York, New York 10112
(212) 541-4000
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 783-6518
* Attorney of Record

FRED N. FISHMAN
ROBERT H. KAPP
Co-Chairmen
NORMAN REDLICH
Trustee
WILLIAM L. ROBINSON
NORMAN J. CHACHKIN
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1400 Eye Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 371-1212

Attorneys for *Amicus Curiae*